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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91226317
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

MMETRO.COM LLC		X	
	v.	:	Opposition No. 91226317
	Opposer	:	
		:	Serial No. 86504326
		:	
		:	
YOLOTECH, LLC		:	
	Applicant	:	
		X	

**BRIEF IN SUPPORT OF
APPLICANT’S RESPONSE IN OPPOSITION TO OPPOSER’S MOTION
TO STRIKE APPLICANT’S ANSWER AND AFFIRMATIVE DEFENSES**

COMES NOW the Applicant, YOLOtech, LLC [“Applicant”], by and through Applicant’s undersigned counsel, Mark A. Hoffman, Esquire, who herein timely responds in opposition to Opposer’s Motion to Strike Applicant’s Answer and Affirmative Defenses [“Opposer’s Motion to Strike”]. Pursuant to the legal standards and analysis set forth in this response, Opposer’s Motion to Strike must be denied consistent with the arguments and requests stated herein.

Thereafter, this opposition proceeding should proceed forthwith according to the deadlines set forth in the Conference, Discovery, Disclosure, and Trial Schedule outlined in the Order of the Trademark Trial and Appeal Board [“Board”] dated February 16, 2016. *Board’s Order 2/16/2016*, Dkt. 2.

BACKGROUND

On February 16, 2016, mMetro.com LLC filed a Notice of Opposition opposing

Applicant's THRILLIA Mark Application No. 8650436. *Notice of Opposition*, Dkt. 1. In the Notice of Opposition, Opposer set forth various allegations pertaining to "likelihood of confusion" and "bridging the gap" arising under Section 2(d) of the Lanham Act. *15 U.S.C. 1052(d)*. Specifically, Opposer stated "that it is or will be damaged by the registration of THRILLIA Application Serial No. 86/504,326," and thereafter set forth specific averments regarding reasons for a "likelihood of confusion" and "bridging the gap." *See Notice of Opposition*, Dkt. 1.

On March 18, 2016, Applicant timely filed an Answer and Affirmative Defenses ["Answer"]. *See Answer*, Dkt. 4. On April 8, 2016, Opposer filed the present Opposer's Motion to Strike pursuant to Fed. R. Civ. P. 12(f). *See Opposer's Motion to Strike*, Dkt. 5.

As more fully discussed herein, Opposer's Motion to Strike is inapposite to well-settled procedural rules and the progeny of case law regarding pleadings. In particular, Opposer's Motion to Strike is an anathema Fed. R. Civ. P. 12(f) motion practice, which carries substantial disfavor within the federal courts as being tactically suspect in its use. *See infra* at Legal Standard.

On its face, Opposer's Motion to Strike is a transparent maneuver primarily crafted to delay and harass. Indeed, the final stanza of Opposer's Motion to Strike requests a stay of all proceedings, which would cause needless delay. Accordingly, for the reasons set forth below, and in the interests of substantial justice, Opposer's Motion to Strike must be denied, except as otherwise stated by Applicant. The opposition proceeding should progress in accordance with the current deadlines set by the Board.

LEGAL STANDARD

Fed. R. Civ. P. 12(f) provides, in relevant part, that "[t]he court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." The

decision to strike portions of a pleading for the reasons enumerated in Rule 12(f) is within the sound discretion of the court. *See Talbot v. Robert Matthews Distributing Co.*, 961 F.2d 654, 665 (7th Cir. 1992); *see also Alvarado-Morales v. Digital Equipment Corp.*, 843 F.2d 613, 618 (1st Cir. 1988). “Any doubt about whether the challenged material is redundant, immaterial, impertinent, or scandalous should be resolved in favor of the non-moving party.” *5C Fed. Prac. & Proc. Civ. § 1382* (3d. ed. 2016).

For the moving party to prevail on a Fed. R. Civ. P. 12(f) motion, “the federal courts have established a standard under which it must be shown that the allegations being challenged are so *unrelated* to the plaintiff’s claims as to *be unworthy of any consideration as a defense* and that their presence in the pleading throughout the pleading will be *prejudicial* to the moving party.” *5C Fed. Prac. & Proc. Civ. § 1380* (3d. ed. 2016) (emphasis added). It is axiomatic that “matter will not be stricken from a pleading unless it is clear that it can have *no possible bearing upon the subject matter of the litigation*...Even if the allegations are redundant or immaterial, they need not be stricken if their presence in the pleading cannot prejudice the adverse party.” *Harsco Corp. v. Electric Sciences, Inc.*, 9 U.S.P.Q. 2d 1570 (Trademark Tr. & App. Bd.), 1988 WL 252330 at *2 (emphasis added) *citing 2A Moore’s Federal Practice § 12.2[2]* (2d ed. 1985); “*see also Leon Shaffer Golnick Advertising, Inc. v. William G. Pendill Marketing Co., Inc.*, 177 U.S.P.Q. 401 (Trademark Tr. & App. Bd.), 1973 WL 20092 at *2 (When ruling on a motion to strike, “matter will not be stricken unless it clearly has no bearing upon the issues under litigation.”).

“Both because striking a portion of a pleading is a drastic remedy and because it often is sought by the movant to as a *dilatory or harassing tactic*, numerous judicial decisions make it clear that motions under Rule 12(f) are viewed with disfavor by federal courts and are infrequently

granted.” *5C Fed. Prac. & Proc. Civ. § 1380* (3d ed. 2016) (emphasis added). “[B]ecause federal judges have made it clear, in numerous opinions they have rendered in many substantive contexts, that Rule 12(f) motions to strike on any of these ground are not favored, often being considered purely *cosmetic* or ‘*time wasters*,’ there appears to be general judicial agreement, as reflected in the extensive case law of the subject, that they should be denied unless the challenged allegations have *no possible relation or logical connection* to the subject matter of the controversy and may cause some form of *significant prejudice* to one of more of the parties in the action.” *5C Fed. Prac. & Proc. Civ. § 1382* (3d ed. 2016) (emphasis added).

As more fully developed and argued below, Applicant’s Answer comports with the strictures of the applicable pleading rules. The statements set forth in the Answer have a substantial bearing and logical connection to the Applicant’s defense of its application, and directly impact the core factual inquiries in this opposition proceeding: the “likelihood of confusion” between the THRILLIST and THRILLIA marks through the lens of the *DuPont* analysis. See *In re E. I. DuPont DeNemours & Co.*, 476 F.2d 1357 (CCPA 1973); see also *Hewlett Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261 (Fed. Cir. 2002).

Opposer’s Motion to Strike should greeted by the Board with the same disfavor generally accorded Fed. R. Civ. P. 12(f) motions in the federal courts—denial of both Opposer’s Motion to Strike and Opposer’s prayer for a stay of proceedings.

I.

APPLICANT’S ANSWER MUST NOT BE STRICKEN

A. Applicant’s Answer Does Not Contain Improper Demands for Proof

Incredulously, Opposer takes umbrage with the fact that Opposer carries the burden of

proof in this proceeding on the elements of the claims of “likelihood of confusion” and “bridging the gap.” Opposer vents annoyance to the Board arising out of Applicant’s demands for proof by way of averments in the Answer.

The demand for proof on the factual issues pled in the Notice of Opposition is hardly “improper,” and amounts to little more than the applicable legal guidepost for an opposition proceeding. “It is the opposer’s burden to establish facts sufficient to support the conclusion that confusion, mistake, or deception is likely.” *Bridgestone America’s Tire Operations, LLC v. Federal Corp.*, 673 F.3d 1330, 1333 (Fed. Cir. 2012). Demanding proof is staple of a defense.

In this regard, Opposer’s protestations are frivolous, lacking in merit, and should gain no traction with the Board. It is inconceivable that Opposer can claim prejudice for the simple demand that the Opposer prove the elements its case. Such nit-picking is emblematic of the disfavored light which federal judges cast upon Fed. R. Civ. P. 12(f) motions and motion practice, and why such motions are infrequently granted. *5C Fed. Prac. & Proc. Civ. § 1380* (3d ed. 2016) (Rule 12(f) motions “are viewed with disfavor by federal courts and are infrequently granted.”).

The demand for “proof” is inherent in an *inter partes* proceeding, and a fundamental characteristic of the adversarial relationship of the parties. *See 37 C.F.R. § 2.116(b)* (2007) (“The opposer in an opposition proceeding...shall be in the position of plaintiff, and the applicant in an opposition proceeding...shall be in the position of defendant.”). As a general principal of “black letter law,” the plaintiff, absent prescriptions for burden-shifting, has the burden of proof. Nothing more—and certainly nothing less. While it is unclear what threshold level of hubris is required for an opposer to complain to the Board about having the burden of proof on the elements of its “likelihood of confusion” and bridging the gap” claims, it is quite obvious that this Opposer has

stepped over that threshold.

Such querulous issue-dredging belittles the inherent purpose of Fed. R. Civ. P. 12(f) motion practice, and further instigates and promotes the general disfavor notoriously enjoyed by such motions. Opposer's Motion to Strike on this issue is palpably wasteful in both time and expense, and perilously borders on abusive motion practice. *See Fed. R. Civ. P. 1* ("These Rules...should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.").

Applicant's demand for proof in the Answer is appropriate within the context of the assigned roles of the parties and the assumed burdens of persuasion and proof in this opposition proceeding and the nature of defending against claims. These roles are determined, *de jure*, and their strict delineation by way of an Answer is proper. Certainly, such statements in the Answer can hardly be deemed prejudicial in *any* conceivable manner, nor do they depart from any logical connection to the issues. Proofs undergird all issues in this proceeding. Accordingly, these demands for proof in Applicant's Answer should not be stricken.

B. Applicant's Answer Does Not Contain Statements That Are Either Immaterial, Impertinent, or Prejudicial

Opposer erroneously claims that "Applicant's Answer must be struck because it contains lengthy, extraneous, single-spaced quotations that are immaterial, impertinent and prejudicial." *Opposer's Motion to Strike* at 3, Dkt. 5. Opposer's remarks are mundane and conclusory, and their talons hold a tenuous grasp on a on the perch of the pleading rules pertaining to defenses.

Contrary to Opposer's selectively stated and truncated recitation of Fed. R. Civ. P. 8 to the Board, additional provisions of Rule 8 are noteworthy:

(b) **Defenses: Admissions and Denials.**

- (1) In General. In responding to a pleading, a party must:
 - (A) state in short and plain terms its defenses to each claim asserted against it; and
 - (B) admit or deny the allegations asserted against it by an opposing party.
- (2) Denials—Responding to the Substance. *A denial must fairly respond to the substance of the allegation.*

(d) **Pleading to be Concise and Direct; Alternative Statements; Inconsistency.**

- (1) In General. Each allegation must be simple, concise, and direct. *No technical form is required.*
- (2) Inconsistent Claims or Defenses. A party may state *as many separate* claims or *defenses* as it has, regardless of consistency.

Fed. R. Civ. P. 8(b) [emphasis added].

Applicant’s Answer is consistent with Fed. R. Civ. P. 8 because the Applicant “fairly responds to the substance of the allegation[s]” pressed by Opposer under “likelihood of confusion” and “bridging the gap” theories. Further, Applicant has stated as many defenses as it currently has regardless of inconsistency. Additionally, Fed. R. Civ. P. 12(b) mandates: “Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required.” Applicant merely sets forth responsive defenses which clearly have bearing on the litigated issues. *See Leon Shaffer Golnick Advertising, Inc., supra* at *2 (When ruling on a motion to strike, “matter will not be stricken unless it clearly has no bearing upon the issues under litigation.”).

Certainly, marketing and advertising statements are probative of the strength or fame of a registered mark, plays role in the *DuPont* analysis, and will be critical to Applicant's defense of the THRILLIA Mark. *See Coach Services, Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1366-67 (Fed. Cir. 2012) ("The fame of the registered mark plays a 'dominant' role in the *DuPont* analysis..."). Relevant factors regarding "fame" for purposes of "likelihood of confusion" include "sales, advertising, length of use of the mark, market share, brand awareness, and variety of goods bearing the mark." *Id.* at 1367. The statements from from the THRILLIST website, while not *evidentiary* at this stage of the proceedings, *see infra*, are probative elements of Applicant's defense regarding THRILLIST's purported "fame," and are provided as "fair notice" to the Opposer of this element of the defense. Such statements are responsive to the "substance of the allegation" of "likelihood of confusion," and are appropriately included in Applicant's Answer as a defense. *See Fed. R. Civ. P. 8(d)(2)*. Additionally, these statements lack any prejudicial propensities, and forthrightly forecast an important constituent of Applicant's defense.

As to Opposer's allegation that Applicant has engaged in cherry-picking statements, *see Opposer's Motion to Strike* at 5. Dkt. 5, it is truly the Opposer who has cherry-picked arguments based upon a stylized and myopic construction of the *DuPont* analysis. The *DuPont* analysis has a much fuller band-width of considerations than that cherry-picked by Opposer. Opposer's focus on "trade channels" is a narrowly crafted and disingenuous argument. *See id.* at 4. Applicant, in fact, *agrees* with Opposer that, as to *some* of *DuPont* factors, it is proper "for the Board to focus on the application and registrations rather than on real-world conditions, because 'the question of registerability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application.'" *See Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d

1317, 1322-23 (Fed. Cir. 2012) (*citing Octocom Sys., Inc. v. Houston Comp. Servs., Inc.*, 918 F.2d 937, 942 (Fed. Cir. 1990)). However, this portion of the *DuPont* analysis hardly ends the inquiry, and full consideration of the spectrum of applicable *DuPont* factors is essential is essential to Applicant's defense—not those simply those “cherry-picked” by Opposer.

Additionally, with regard to “classes of customers,” the Board may review appropriately developed evidence regarding “real-world conditions.” In *Coach Services, Inc.*, *supra*, for example, the Board made findings of fact and conclusions of law as follows: “The Board found...that Triumph [the applicant in the opposition proceeding] targets educational professionals with responsibility for purchasing educational materials. The Board further found that, although educational professionals ‘may include females between the ages of 25-65,’ the products are ‘not sold under circumstances likely to give rise to the mistaken belief that the products emanate from the sale source.’” 668 F.3d at 1370-71 (*citing Coach Services, Inc. v. Triumph Learning LLC*, 96 U.S.P.Q.2d 1600, 1608 (Trademark Tr. & App. Bd. Sept. 17, 2010)). These findings by the Board extend well beyond the confines of identification of goods and services set forth in the application and registration documents. Inclusion of this genre of statement in the Answer comports with Fed. R. Civ. P. 8(d)(2) as to Applicant's defense, and meets the “fair notice” requirement for pleadings. *See Harsco, supra* at *1 (“Under the Federal Rules of Civil Procedure the function of the pleadings is to give fair notice of the claim asserted.”).

At base, Opposer simply complains that the statements of Applicant's defenses provide Opposer with too much information regarding their substantive nature. This hardly rises to the level of prejudice. In fact, aside from the bald assertion by Opposer that statements in Applicant's Answer are “prejudicial,” Opposer offers no credible showing of prejudice—“significant” or

otherwise. *See 5C Fed. Prac. & Proc. Civ. § 1382* (3d ed. 2016).

Finally, Opposer complains that Applicant’s Answer is “an improper attempt to introduce unauthenticated hearsay evidence.” *Opposer’s Motion to Strike* at 4, Dkt. 5. Opposer is manifestly wrong, and demonstrates an unfortunate and decidedly deficient understanding of the interface between the applicable pleading and evidentiary rules. Exhibits and statements in pleadings are not evidence. *See, e.g. 37 C.F.R. § 2.122(c)* (“[A]n exhibit attached to a pleading is not evidence on behalf of the party to whose pleading the exhibit is attached unless identified and introduced into evidence as an exhibit during the taking of testimony.”). Therefore, any claim that statements offered in Applicant’s Answer are “unauthenticated hearsay evidence” is erroneous. The statements from the THRILLIST website are clearly *not* evidence in this proceeding—yet. *See Safer, Inc. v. OMS Investments, Inc.*, 94 U.S.P.Q.2d 1031 (Trademark Tr. & App. Bd.); 2010 WL 985355 at *8 (Setting forth the predicate elements for admissibility of an Internet source pursuant to a notice of reliance.). But such a determination does not render them inappropriate in an Answer. The presence of the complained of statements in the Answer puts Opposer on “fair notice” that this category of evidence *will be* a component of Applicant’s defenses. Such statements are well within the metes and bounds of the pleading rules regarding defenses, and the weight given to “fair notice.” Accordingly, Opposer’s Motion to Strike on this issue must be denied.

II.

THE FORM OF APPLICANT’S ANSWER IS AN APPROPRIATE RESPONSIVE PLEADING TO OPPOSER’S NOTICE OF OPPOSITION

Opposer erroneously presses upon the Board that “Applicant’s Answer must also be struck because it is argumentative, and rather than admitting and denying allegations in short plain

responses, Applicant prematurely attempts to argue the case based on hearsay and cherry-picked statements.” *Opposer’s Motion to Strike* at 5, Dkt. 5. The issue of “hearsay” and “cherry-picked” statements has already been discussed, *see supra* at §I(B), and need not be rehearsed again.

However, contrary to Opposer’s spurious assessment, Applicant has indeed “admitted” or “denied” or claimed insufficient knowledge to either “admit” or “deny” with respect to each and every allegation set forth in Opposer’s *Notice of Opposition*. *See Fed. R. Civ. P. 8(b)(5)* (“A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial.”). More importantly, Applicant has provided Opposer with “denials that fairly respond to the substance of the allegations.” *Fed. R. Civ. P. 8(b)(2)*.

Further, contrary to Opposer’s allegations that “Applicant’s Answer resembles a brief” and is “argumentative,” *Opposer’s Motion to Strike* at 4, Dkt. 5, it is clear that facially, contextually, and substantively Applicant’s Answer is *an Answer* to a *Notice of Opposition*—and not a brief. Setting aside the fact that Fed. R. Civ. Pro. 8(d)(d) states, with respect to pleadings, that “[n]o technical form is required,” Applicant’s Answer can hardly be claimed to “resemble” a brief. *See Fed. R. Civ. P. 10(b)* (“A party must state claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances.”); *cf. Fed. R. Civ. P. 7(b)* (Motions and Other Papers). Applicant’s Answer is precisely that—an answer which comports with the Federal Rules of Civil Procedures and the strictures of “fair notice.”

Finally, Opposer’s Notice of Opposition makes a substantial *judicial admission* regarding the THRILLIA Mark Application and the THRILLIST Registration which is critical to Applicant’s defense: Opposer states that “the recited goods and services are not identical.” *Notice of*

Opposition at ¶5, Dkt. 1. This lack of identity of goods and services is a central metric in this opposition proceeding, and is appropriately raised in Applicant’s Answer as a defense. Applicant merely reiterates Opposer’s judicial admission in the Answer.

It is well-settled that “[j]udicial admissions are formal concessions in the pleadings...that are binding on the party making them. They may not be controverted at trial or on appeal. Indeed, they are not evidence at all but rather have the effect of withdrawing a fact from contention.” *Keller v. United States*, 58 F.3d 1194, n. 8 (7th Cir. 1995). Accordingly, Opposer has made “formal concessions” that the “recited goods and services are not identical.” This “formal concession” has not been presented in an “argumentative” manner whatsoever in Applicant’s Answer. Indeed, it need not be argued at all—*it has been conceded*. Accordingly, *Opposer’s Motion to Strike* lacks merit on these issues, and must be denied.

III.

APPLICANTS ANSWER DOES NOT CONTAIN IMPERTINENT OR SCANDALOUS ALLEGATIONS

Opposer continues the sojourn into frivolous motion practice, and once again highlights for the Board why Fed. R. Civ. P. 12(f) motions “are viewed with disfavor by federal courts and are infrequently granted.” *5C Fed. Prac. & Proc. Civ. § 1380* (3d ed. 2016). Opposer objects to the term “gutteral” claims that it portrays “an unsavory description of Opposer’s THRILLIST Mark [which] is prejudicial and unnecessarily reflects on the moral character or reputation of Opposer’s THRILLIST Mark.” This statement is ridiculous. Opposer would have been well-served to consult a dictionary before engaging in a hollow diatribe concerning the term “guttural,” and prior to offering such an inaccurate and frankly puerile dissertation to the Board. Opposer is accusing Applicant of name-calling without a scintilla of understanding of the linguistic meaning

of the term “guttural.” “Guttural” is a term of art which refers to a quality of vocal intonation, timbre, and pronunciation. It bears no relationship to “street gutters” or “moral character.”

The word “guttural” is defined in the Merriam-Webster Dictionary as “articulated in the throat.” The Dictionary further explains: “This is reflected in the word's Latin root - *guttur*, meaning ‘throat.’ Despite the similarity in sound, ‘guttural’ is not related to the English word *gutter*, which comes (by way of Anglo-French) from Latin *gutta*, meaning ‘drop.’” <http://www.merriam-webster.com/dictionary/guttural> (accessed April 20, 2016). “Guttural speech sounds are those with a primary place of articulation near the back of the oral cavity. In some definitions, this is restricted to pharyngeal consonants, but in others includes some velar and uvular consonants. Guttural sounds are typically consonants, but some vowels’ articulations may also be considered guttural in nature. Although the term has historically been used by phoneticians, and is occasionally used by phonologists today, it is now more common in popular use as an imprecise term for sounds produced relatively far back in the vocal tract.” <https://en.wikipedia.org/wiki/Guttural> (accessed April 19, 2016).

The term therefore hardly rises to the level of “repulsive language that detracts from the dignity” of this proceeding. *See Cobell v. Norton*, 224 F.R.D. 1, 5 (D.D.C. 2004). What is undignified is Opposer’s lodging of silly schoolyard allegations without any understanding of what the term “guttural” actually means. *Worse, Opposer embarrassingly made no discernible effort to find out.*

A key factor in the *DuPont* analysis for “likelihood of confusion” pertains to the “similarity or dissimilarity of the marks in their entireties as to appearance, *sound*, connotation and commercial impression.” *In re E.I. DuPont DeNemours & Co. supra* at 1361 [emphasis added];

see also In re Vitterra, Inc., 671 F.3d 1358, 1360 (Fed. Cir. 2012) (Discussing the identity of sounds between two mark.”). Applicant’s defense, among others, is that there exists distinct sound patterns and differences between the words THRILLIA and THRILLIST. This is a *defense* to the Opposer’s claim of “likelihood of confusion,” and is appropriately stated in the Answer.

Opposer’s erroneous interpretation of the term “guttural” is, to borrow from Opposer’s lexicon, “over-the-top,” *see Opposer’s Motion to Strike* at 5, Dkt. 5, —and not Applicant’s use of the term. “Guttural” is a purely descriptive term as applied to sound quality and harbors no moral or base connotations. Any diligent and thoughtful investigation of the term would have unveiled that “guttural” is neither “impertinent” nor “scandalous,” as well as the reason it is stated among the defenses.

The vocal and aural differences between the words THRILLIST and THRILLIA are unmistakable, prominent, and distinct, and these differences are core elements in Applicant’s defense of the THILLIA Mark application. Opposer’s analysis is reckless in its shortcomings, and amounts to thoughtless harassment of the Applicant. Accordingly, Applicant’s Answer should not be stricken in this regard, and Opposer’s Motion to Strike should be denied on this point.

IV.

APPLICANTS’ AFFIRMATIVE DEFENSES

A. Applicant’s First Affirmative Defense Should be Dismissed Without Prejudice

In the interests of avoiding unnecessary delay and further expense, Applicant herein voluntarily withdraws the defense of “failure to state a claim upon which relief can be granted,” *without prejudice*, pursuant to Federal Rule of Civil Procedure 12, which provides in relevant part:

(h) Waiving and Preserving Certain Defenses:

- (2) When to Raise Others. Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:
 - (A) In any pleading allowed or ordered under Rule 7(a);
 - (B) By motion under Rule 12(c);
 - (C) at trial.

Applicant, therefore, respectfully requests that the Board issue an Order striking Applicant's First Affirmative Defense, *without prejudice*, pursuant to the Board's authority under Fed. R. Civ. P. 12(f). Opposer's Motion to Strike Applicant's First Affirmative Defense, in that regard, will thereby be rendered moot.

B. Applicants Second and Third Affirmative Defenses Must Simply be Construed Pursuant to Federal Rule of Evidence 9 as General Defenses, and Must Not be Stricken

Opposer complains in Opposer's Motion to Strike that Applicant's Second and Third Affirmative Defenses are redundant, and fail to set forth anything more availing than a general negative defense. These defenses retain vitality, even if misclassified by Applicant as affirmative defenses, and should not be stricken.

"In attempting to controvert an allegation in the complaint, a defendant occasionally may label his negative averment as an affirmative defense rather than as a specific denial. But as long as the pleading clearly indicates the allegations in the complaint that are intended to be placed in issue, the improper designation would not operate to prejudice the pleader. If the plaintiff has been given 'plain notice' of the matters to be litigated, which is all the federal pleading rules

require, he should put on his proof on those issues irrespective of any error by the defendant regarding terminology.” 5 *Fed. Prac. & Proc. Civ.* § 1269 (3d ed. 2016). In the present instance, in finding the “affirmative defenses” to be redundant, *see Opposer’s Motion to Strike* at 7, Dkt. 5, it is apparent that Opposer has “plain notice” concerning which allegations in the Notice of Opposition are at issue with respect to Applicant’s defenses.

Therefore, to the extent that Applicants Second and Third Affirmative Defenses fail to meet the requirements for “affirmative defenses,” it is well-settled law that “[p]leadings *must* be construed so as to do justice.” *Fed. R. Civ. P. 8(e)* [emphasis added]. Matter will not be stricken from a pleading under Rule 12(f) “unless it is clear that it can have no possible bearing upon the subject matter of the litigation...Even if the allegations are redundant or immaterial, they need not be stricken if their presence in the pleading cannot prejudice the adverse party.” *Harsco Corp.*, *supra* at *2.

Opposer otherwise fails to offer any compelling reason for striking these negative defenses beyond their alleged inappropriate designation as “affirmative defenses.” Opposer forwards no argument of significant prejudice, and has none to articulate. Accordingly, Applicant’s Second and Third Affirmative Defenses must not be disturbed.

C. Applicant’s Fourth Affirmative Defense is Withdrawn Without Prejudice

Applicant herein voluntarily withdraws Applicant’s Fourth Affirmative Defense *without prejudice* to Applicant’s substantive rights. Applicant, therefore, respectfully requests that the Board issue an Order striking Applicant’s Fourth Affirmative Defense, *without prejudice*, pursuant to the Board’s authority under Fed. R. Civ. P. 12(f). Opposer’s Motion to Strike Applicant’s First Affirmative Defense, in that regard, will thereby be rendered moot.

V.

THESE OPPOSITION PROCEEDINGS SHOULD NOT BE SUSPENDED

For the reasons set forth herein with respect to the issues raised in Opposer's Motion to Strike pursuant to Fed. R. Civ. P. 12(f), and based upon the prudent, and appropriate voluntary withdrawal of certain "affirmative defenses" by Applicant, the Board should otherwise deny Opposer's Motion to Strike. These opposition proceedings should thereafter be postured to proceed according to the deadlines set forth in the Conference, Discovery, Disclosure, and Trial Schedule set forth in the Board's Order dated February 16, 2016. *Board's Order 2/16/2016*, Dkt. 2.

In the alternative, Applicant should be granted leave to amend the Answer pursuant to Fed. R. Civ. P. 15. *See Fed. R. Civ. P. 15(a)(2)* ["The court should freely give leave when justice so requires."]; *see also TBMP §507.02*. In the present instance, and in light of Applicant's responses state above, amendments to the Answer are unnecessary. Applicant's responses regarding the affirmative defenses, couple with the denial of the remainder of Opposer's Motion to Strike, will *de jure* appropriately amend the Answer to comport with all applicable pleading rules.

Respectfully submitted,

Counsel for Applicant, YOLOtech, LLC

By:



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Date: April 25th, 2016

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 25st day of April, 2016, a true copy of the and correct copy of the foregoing **BRIEF IN SUPPORT OF APPLICANT'S RESPONSE IN OPPOSITION TO OPPOSER'S MOTION TO STRIKE APPLICANT'S ANSWER AND AFFIRMATIVE DEFENSES** was served via email PDF (courtesy copy) and by First Class U.S. Mail, postage pre-paid, on the following:

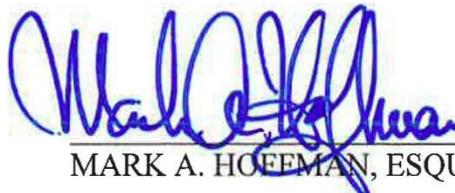
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MARK A. HOFFMAN, ESQUIRE

CERTIFICATE OF ELECTRONIC FILING

The undersigned certifies that this submission (along with any paper referred to as being attached or enclosed) is being filed with the United States Patent and Trademark Office via the Electronic System for Trademark Trials and Appeals (ESTTA) on this 25th day of April, 2016.



MARK A. HOFFMAN, ESQUIRE

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

MMETRO.COM LLC	X	
	:	Opposition No. 91226317
v.	:	Serial No. 86504326
	:	
YOLOTECH, LLC	:	
Applicant	:	
	X	

**APPLICANT’S RESPONSE TO THE
DECLARATION OF RALPH H. CATHCART, ESQ.**

I, Mark A. Hoffman, Esquire, on behalf of the Applicant, YOLOtech, LLC, do hereby declare that the following statements set forth below are true and correct pursuant to 28 U.S.C. §1746 pertaining to unsworn declarations under penalty of perjury. I herein respond to the Declaration of Ralph H. Cathcart, Esq. [“Mr. Cathcart”].

1-3. Admitted in part and denied in part. It is specifically denied that Applicant’s Answer to Notice of Opposition and Affirmative Defenses are in any way “putative.” Applicant incorporates by reference as though fully set forth herein the Brief in Support of Applicant’s Response in Opposition to Opposer’s Motion to Strike Applicant’s Answer and Affirmative Defenses in response to Mr. Cathcart’s Declaration.

APPLICANT’S ANSWER MUST NOT BE STRUCK

4-9. Denied. Applicant specifically denies any and all allegations and legal conclusions which claim that Applicant’s Answer to the Notice of Opposition must be stricken. In in further response to Mr. Cathcart’s Declaration, Applicant incorporates by reference as though fully set forth herein the Brief in Support of Applicant’s Response in Opposition to Opposer’s Motion to

Strike Applicant's Answer and Affirmative Defenses.

**APPLICANT'S AFFIRMATIVE DEFENSES
MUST NOT BE STRICKEN IN THEIR ENTIRETY**

11-13. Denied. It is specifically denied that Applicants Affirmative Defenses in their entirety fail to comport with or be supported by applicable law. In in further response to Mr. Cathcart's Declaration, Applicant incorporates by reference as though fully set forth herein the Brief in Support of Applicant's Response in Opposition to Opposer's Motion to Strike Applicant's Answer and Affirmative Defenses.

WHEREFORE, for the reasons set forth in and consistent with the Brief in Support of Applicant's Response in Opposition to Opposer's Motion to Strike Applicant's Answer and Affirmative Defenses, Applicant respectfully requests that the Trademark Trial and Appeal Board ["Board"] deny Opposer's Motion to Strike Applicant's Answer and Affirmative Defenses. Applicant respectfully requests that the Trademark Trial and Appeal Board ["Board"] issue an Order consistent with Applicant's Response in Opposition incorporated herein, and allow these proceedings to move forward under the Conference, Discovery, Disclosure, and Trial Schedule outlined in the Board's Order dated February 16, 2016. *Board's Order 2/16/2016*, Dkt. 2. In the alternative, Applicant respectfully requests leave of the Board to file an Amended Answer and Affirmative Defenses.

These statements are declared true and correct under the penalties of perjury.

Executed on April 25th, 2016 in the City of Margate, Atlantic County, New Jersey.

Respectfully submitted,

By:



MARK A. HOFFMAN, ESQUIRE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 25st day of April, 2016, a true copy of the and correct copy of the foregoing **APPLICANT'S RESPONSE TO THE DECLARATION OF RALPH H. CATHCART, ESQ.** was served via email PDF (courtesy copy) and by First Class U.S. Mail, postage pre-paid, on the following:

Ralph H. Cathcart, Esquire
LADAS & PARRY LLP
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New York, New York 10018
RCathcart@ladas.com



MARK A. HOFFMAN, ESQUIRE

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